

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Monadnock Developmental Services Inc.

DECISION OF THE HEARING OFFICER

Appearances: Mark Broth, Esq., representing Monadnock Developmental Services Inc.

Nature of Dispute: RSA 275-E:1 I, illegal termination for protected reporting of an illegal activity
RSA 275-E:3, illegal termination for protected refusal to execute an illegal directive

Employer: Monadnock Developmental Services Inc., 121 Railroad Street, Keene, NH 03431

Date of Hearing: September 28, 2011

Case No.: 42113

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that she was illegally terminated on April 20, 2011 because she reported to her employer that the forging of documents for a State of New Hampshire certification was illegal, that she would not participate in this activity, and because she advised a potential home care provider of a potential danger with a client. She requests, as relief in this action, severance pay and an investigation of the employer for their misuse of state funds and mismanagement of programs.

The employer states the claimant effectively voluntarily resigned on April 18, 2011 when she told Ann Piche, a Program Manager, that she was “done with the program and done with Monadnock Developmental Services (MDS) and the way they operate.” On April 20, 2011, MDS formally terminated its relationship with the claimant, noting her intention to quit as well as her inappropriate disclosure of confidential client information, which was a violation of her confidentiality agreement.

FINDINGS OF FACT

The claimant worked as a direct support professional for the employer from March 24, 1998 through April 20, 2011. She worked almost exclusively with one client until he passed away in December 2010.

The employer assigned a new client to the claimant, on a part-time basis, in January 2011. The claimant contends the employer asked her to forge missing notes for

this client because an audit by the State of New Hampshire was approaching. She testified she verbalized her complaints that forging missing notes was illegal, and that she would not participate in forging documents with a supervisor. She stated the original notes were found prior to the audit. The employer argues they were unaware of any reporting of the claimant being asked to forge documents, but that the claimant expressed concern with the clients program, and they immediately offered her hours with a different client.

The claimant suffered a personal injury in late January 2011. She returned to work when she was given hours with another client in February 2011. She worked with this client until her termination on April 20, 2011. During her time with this client, the client was aggressive both verbally and physically. She suffered scratches from attacks by the client. In early April 2011, the claimant attended a meeting with the employer to discuss her client's current status. The employer made the decision to move the client to a home care setting, rather than having direct support professionals, such as the claimant, continue the care. The claimant was upset when she learned the potential home care provider was unaware of the client's aggressive behavior and, sometime in April 2011 prior to her April 18, 2011 meeting and her termination, she spoke to the home care provider to inform her of the client's aggressive behavior. The claimant held the belief it was illegal not to inform the home care provider of potential dangers with this client.

The claimant met with Anne Piche, the Program Manager in the MDS Peterborough office, on April 18, 2011, when she advised that her position with this client was being eliminated because the client was moving into a home care setting. The employer told the claimant that they would help to her find hours with another client. At the end of this conversation, the claimant said she was "done with the program and done with Monadnock Developmental Services and the way they operate." The employer submitted internal MDS emails dated April 19, 2011, Defendant's Exhibit #1, memorializing the conversation between Piche and the claimant on April 18, 2011.

On April 20, 2011, Priscilla Brisson, Director of Human Resources for MDS, and Kyle Hayman, Associate Director for MDS, called the claimant into a meeting. The employer terminated the claimant because she stated her intention to quit on April 18, 2011 during her meeting with Piche and for her inappropriate disclosure of confidential client information to the potential home care provider, which the employer considered a violation of the claimant's signed confidentiality agreement, dated June 18, 2003.

The claimant contacted Kenneth Lindberg, Program Liaison for Bureau of Developmental Services, a division of the State of New Hampshire's Department of Health and Human Services, by telephone on April 20, 2011 to discuss her concerns regarding the employer's practices that she considered illegal. On April 21, 2011, Lindberg contacted MDS about the claimant's concerns. The employer told Lindberg that she had been "in effect" terminated. The claimant's employment terminated prior to Lindberg's contact with the employer, and the claimant does not allege her contact with Lindberg resulted in her termination.

DISCUSSION AND CONCLUSIONS

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. she engaged in an act or acts protected by the statute;
2. she suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts she engaged in (her reporting of, and refusal to participate in, forging documents, and for advising a home care provider of a potential danger) and the action she suffered as a result of those protected acts (termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected act/s.

The claimant establishes a *prima facie* case of illegal termination. She reported to the employer that forging documents was illegal and she would not do so. She further notified a home care provider of a potential danger with a client, as she felt it was illegal not to do so. The employer terminated the claimant. There is a causal connection, between both her protected reporting of what she believed was, and her protected refusal to execute, an illegal directive, and her notifying the home care provider of the potentially dangerous situation, which the claimant in good faith believed it was illegal not to notify the home care provider of a potentially dangerous situation, to her termination.

The employer argues the claimant did not report the issue of being asked to forge documents and/or refusing to do so in January 2011, but that the claimant expressed concern with the client's program and was then offered hours with a different client. The employer contends they did not retaliate against the claimant for her report, as they have no record of her making a report. The claimant received hours with a new client in February 2011 and worked with this client for approximately two months when the claimant was notified the position with that client was being eliminated as the client was moving into a home care setting. At that time, the claimant expressed she was "done with MDS and the way they operate". Prior to her April 18, 2011, meeting with Anne Piche, the claimant also contacted the potential home care provider to advise them of a potentially dangerous situation with the client, a direct violation of her confidentiality agreement. MDS then officially terminated her employment, not as retaliation, but as she had expressed her intent to quit and because they believed she violated her confidentiality agreement. The employer, therefore, establishes that they terminated the claimant for legitimate, non-retaliatory reasons.

The Hearing Officer finds that the claimant failed to show that the proffered legitimate, non-retaliatory reasons for her termination are not the true reasons for her termination. The claimant, therefore, failed to prove by a preponderance of the evidence that she was terminated in retaliation for her protected acts.

DECISION

Based on all the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was terminated in retaliation for her protected reporting and because of her protected refusal to execute an illegal directive, it is hereby ruled that the Whistleblower's Claim is invalid.

Melissa J. Delorey

Date of Decision: October 11, 2011

Original: Claimant
cc: Employer

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MJD/all